

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Vincent Schonarth, et al.

v.

Civil No. 06-cv-151-JM

Dennis A. Robinson,  
Director, Carroll County  
Department of Corrections

**O R D E R**

In this civil rights action brought pursuant to 42 U.S.C. § 1983, plaintiffs Vincent Schonarth, Bruce Blomquist and Philip Haley challenge the conditions of their confinement at the Carroll County House of Corrections ("CCHOC"), where they were held as pretrial detainees at different times between March 2002 and October 2003.<sup>1</sup> The CCHOC was demolished in November 2003, and plaintiffs are now housed at the Northern New Hampshire

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<sup>1</sup>In the complaint, plaintiffs sought class action status; however, no motion has been filed to certify a class, and nothing in the complaint or the pending motions demonstrates that this action satisfies the requirements to be certified as a class action. See Fed. R. Civ. P. 23(a). Accordingly, this action is being treated as one brought by the three individual plaintiffs, and the asserted claims are analyzed based only on the facts relevant to their confinement.

Correctional Facility or the Lakes Region Correctional Facility. Defendant Dennis A. Robinson ("Robinson") was director of the CCHOC at all relevant times. He has moved for summary judgment (document no. 9). For the reasons set forth below, defendant's motion is granted in part and denied in part.

### DISCUSSION

#### **1. Background<sup>2</sup>**

Plaintiffs were held on the "B Block" of the CCHOC, which was the center block of three blocks at the prison. It contained four adjacent cells, which were each five feet by seven feet. Although the cells were designed to hold two men, they typically held just one inmate. The cells each contained a toilet and sink unit, plus a bed. The row of cells faced a hallway, which was twenty feet long by four feet wide. The hallway was referred to

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<sup>2</sup>The facts are taken from Defendant's "Statement of Undisputed Material Facts," see Def.'s Mem. in Supp. of M. for Summ. J. at 2-10 (document no. 9.1) ("Def.'s Mem.") and exhibits attached thereto ("Def.'s Ex."), and from the affidavits submitted in support of Plaintiffs' Objection, see Pls.' Obj. to Def.'s M. for Summ. J. (document no. 12) ("Pls.' Obj."). See United States District Court for the District of New Hampshire Local Rule ("LR") 7.2(b)(1) and (2) (requiring summary judgment motions be accompanied by a statement of material facts supported by appropriate record citations, and any objection to state which facts are disputed with similarly appropriate record citations); see also Fed. R. Civ. P. 56(c) and (e).

as the "bullpen." B Block had no exterior windows; however, it opened to A Block, which had windows that allowed fresh air to come into the bullpen.

Plaintiffs were confined to the interior space of B Block and deprived of natural light and the out of doors. The visit room of B Block was at one end of the bullpen and also had no windows. Plaintiffs ate all their meals in the visit room. Due to staffing constraints at the CCHOC, plaintiffs were not allowed out in the yard, except on irregular occasions during the summer. Plaintiffs were allowed out of their cells for two hours per day of free time in the bullpen. Their recreational activities were limited to board games, cards, and stationary exercises like sit-ups, pull-ups and push-ups, and whatever walking the confined space would enable.

Plaintiffs state that their cells were dirty. Defendant explains that plaintiffs were responsible for cleaning their cells and were given cleaning supplies daily. Plaintiffs claim the toilet/sink unit was filthy and contained dirty water, which overflowed occasionally. They also assert that B Block did not have good heating or ventilation systems, which caused it to be cold in the winter and hot in the summer, but inmates were given

extra blankets in the winter and fans in the summer to compensate for the temperature extremes. Doors were also opened to facilitate ventilation.

Plaintiff Blomquist was housed at the CCHOC from June 2002 until October 2003, and resided on B Block for seven months. He asked to be moved out of B Block on December 22, 2002, which request was granted on December 25, 2002. Plaintiff Haley was held at the CCHOC from December 2002 until July 2003 and spent several months on B Block.<sup>3</sup> Plaintiff Haley was moved into B Block in January 2003 after he requested to be placed there. Plaintiff Schonarth was at the CCHOC from March 2002 until August 2003 and spent all his time on B Block. None of the plaintiffs was housed on B Block for disciplinary reasons. In November 2003 the CCHOC was razed.

Plaintiffs first filed grievances about the conditions at the CCHOC in February 2006. Defendant did not respond to those grievances, because the conditions about which they complained no longer existed and plaintiffs were housed elsewhere. Plaintiffs

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<sup>3</sup>It is unclear from the pleadings whether Haley left the CCHOC in July 2003 or 2004. Cf. Pls.' Obj., Aff. of Philip Haley ¶ 2 (document no. 12.3), with Def.'s Mem. at 2. His departure date, however, does not affect the disposition of the pending motion.

did not pursue the grievances any further through the administrative review process but, instead, commenced this action in April 2006.

## **2. Summary Judgment Standard**

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Navarro v. Pfizer Corp., 261 F.3d 90, 93-94 (1st Cir. 2001) (citing authority). The burden of showing an absence of any genuine issues of material fact lies with the moving party. See id. The facts must be viewed in the light most favorable to the non-moving party, construing all reasonable inferences in its favor. See id. (quoting Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990); see also Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000) (explaining how to construe the record). When, as the case is here, the non-moving party objects to the motion, the burden shifts to it to demonstrate that there are real disputes about facts which will affect the final disposition of the claims. See Navarro, 261

F.3d at 93-94 (objecting party "cannot rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute"); see also McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995) (defining material facts and genuine dispute). Only if, after construing the record in the light most favorable to plaintiffs, no genuine issue of material fact emerges, may defendant's motion be adjudicated. See Navarro, 261 F.3d at 94.

### **3. Defendant's Argument**

Defendant makes six arguments in support of his motion for summary judgment. First, he contends plaintiffs failed to exhaust their available administrative remedies and are barred, therefore, from bringing this action, pursuant to 42 U.S.C. § 1997e(a). Second, he states that plaintiffs cannot assert claims based on emotional distress because they neglected to file medical grievance forms related to the alleged injuries, as required by 42 U.S.C. § 1997e(e). Third, he claims plaintiffs are barred by the statute of limitations from challenging any conditions that existed before April 21, 2003. Next he contends that those conditions that existed within the relevant time frame, from April 21, 2003, through November 2003, in fact were

constitutional. Fifth, he asserts the defense of qualified immunity. And finally, defendant argues that if plaintiffs intended to sue him in his official capacity, they have not shown that a custom or policy caused the alleged deprivations to render the county liable.

Plaintiffs object to all these arguments, although they waive their request for compensatory damages for “mental or emotional injuries” caused by the alleged unconstitutional conditions at the CCHOC. See Pls.’ Obj. at 6, ¶¶ 15-16. I address the remaining arguments below.

(I) Exhaustion

Defendant first contends that because plaintiffs waited until February 2003 to file grievance forms about the conditions at the CCHOC, their § 1983 action should be barred based on the provisions of 42 U.S.C. § 1997e(a). That section provides:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Id. Defendant argues that plaintiffs’ delay precluded him from appropriately responding to their grievance forms because the identified problems were eliminated when the prison was

demolished more than two years earlier. Because plaintiffs failed to timely submit the grievance forms, defendant concludes that they failed to exhaust the administrative remedies that were available at the CCHOC.

It is undisputed that failing to exhaust available administrative remedies bars a § 1983 action. See Jones v. Bock, \_\_\_ U.S. \_\_\_, 127 S. Ct. 910, 919–20 (2007) (citing Porter v. Nussle, 534 U.S. 516, 524 (2002) for rule that exhaustion requirement applies to all inmate suits about prison life); see also Acosta v. U.S. Marshals Serv., 445 F.3d 509, 512 (1st Cir. 2006) (affirming dismissal for detainee’s failure to exhaust county’s administrative remedies); Beltran v. O’Mara, 405 F. Supp. 2d 140, 149 (D.N.H. 2005). Whether or not plaintiffs have exhausted presents a question of law, unless the answer depends on some disputed fact. See id. “[T]he PLRA exhaustion requirement requires proper exhaustion,” Woodman v. Ngo, 548 U.S. 81, 126 S. Ct. 2378, 2387 (2006), which means strict compliance with all the relevant grievance policies and procedures, even if the relief sought is not an available administrative remedy. See id. at 2382–83, 2388–90 (discussing the benefits of exhaustion and requiring inmates to follow “the system’s critical procedural

rules"); see also Acosta, 445 F.3d at 512 ("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require.") (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)); Beltran, 405 F. Supp. 2d at 150 (finding improper exhaustion where inmate failed to follow the proper appeal procedure).

The CCHOC Inmate Grievances Policy Manual does not provide a time limit on the initial filing of a grievance form. See Def.'s Mem, Robinson Aff., Ex. A.<sup>4</sup> While the policy manual sets forth deadlines for the prison to respond - within "a reasonable amount of time" or "within twenty four hours of receipt of the grievance" if it is "of an emergency nature" - no similar time frame is required of the inmate. See id. ¶¶ 3 & 4. Also critical to defendant's argument here is the fact that an appeal is not mandatory, but "may" be requested if the inmate chooses to

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<sup>4</sup>The manual appended to defendant's motion indicates that it was reviewed and revised in February 2003. Defendant represents that this manual states the policies and procedures for filing grievances that applied while plaintiffs were at the CCHOC and that they were aware of them. See Def.'s Mem. at 7. For purposes of this summary judgment motion, where defendant bears the burden of establishing plaintiffs' failure to exhaust, I accept the manual defendant provided in support of his motion as the governing administrative policy and procedure. In any event, if there were a factual dispute about the applicable manual, that would raise a genuine issue of material fact barring summary judgment.

do so. See id. at ¶ 6. The sole definitive time limit set forth in the policy and procedure manual occurs if the matter is appealed to the Carroll County Board of Commissioners. In that circumstance, a report on the corrective action taken must be filed with the Commissioners within thirty days, presumably of the grievance committee review. See id. ¶ 9. Finally, an inmate “can contact the County Attorney’s Office for an external review” if dissatisfied with the results of the Commissioners’ review committee conclusions, see id., but that review, too, is optional, not mandatory.

Based on the plain language of the CCHOC’s policies and procedures for grievance forms, as Woodman’s “proper exhaustion” directive requires, I cannot conclude, as a matter of law, that plaintiffs failed to exhaust their available administrative remedies. To the contrary, they did exactly what the manual prescribed. “When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.” Strong v.

David, 297 F.3d 646, 650 (7th Cir. 2002). While I recognize plaintiffs' more than two year delay in filing their grievance forms impedes the policy goals of enabling prison officials to quickly and efficiently resolve disputes and of creating a record for those cases which advance to litigation, see Woodman, 126 S. Ct. at 2385, § 1997e(a) has been consistently construed to require strict adherence to the prison's particular procedural rules. See id. at 2388; Acosta, 445 F.3d at 513; Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 34-35 (1st Cir. 2002) (requiring inmate to follow prison's grievance policy even though he had been transferred from the facility and its remedies would not provide the relief sought). Based on the undisputed facts, plaintiffs did that. Whether or not the delay undermines plaintiffs' claims of constitutional injury raises a factual issue for the jury to resolve. Defendant's motion for summary judgment based on plaintiffs' failure to properly exhaust the available administrative remedies is denied.

(ii) Emotional or Mental Injuries

Defendant's second argument is that plaintiffs' request for compensatory damages for emotional or mental injuries is barred by 42 U.S.C. § 1997e(e). He contends that because there is no

evidence that plaintiffs suffered physical injury from the challenged conditions, § 1997e(e) prevents plaintiffs from recovering money damages for any emotional or mental distress those conditions allegedly caused.

Section 1997e(e) provides:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Id. (2003). Regardless of the alleged claim that caused the mental or emotional injury, “[t]he plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted.” Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001). “The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional.” Id. (citing Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999)); see also Hines v. Oklahoma, No. CIV-07-197-R, 2007 WL 3046458, \*6 (W.D. Okla. Oct. 17, 2007) (finding § 1997e(e) bars claim for compensatory damages for intentional infliction of emotional distress because no physical injury was alleged); but see Bromell v. Idaho Dep’t of Corrections, No. CVO5-419-N-LMB, 2006 WL

3197157, \*5 (D. Idaho Oct. 31, 2006) (concluding § 1997e(e) bars a federal civil action, but not a state-law claim, for emotional injury). I agree with the line of cases which conclude that § 1997e(e) applies to all actions that are brought in federal court which seek damages for mental or emotional injury, regardless of whether the underlying cause of action is based on federal or state law.

Additionally, although plaintiffs initially sought compensatory damages for mental and emotional distress based on state tort law, see Compl., Count II, plaintiffs now concede they did not file medical grievance forms, or obtain any other evidence of physical injury, related to the conditions of confinement challenged here, and they "concede that the statute thus precludes them from seeking compensatory damages for mental or emotional injuries." Pls.' Obj. ¶ 16. New Hampshire law also requires a showing that physical injury resulted from the emotional distress allegedly caused by defendant's conduct. See In re Bayview Crematory, LLC., 155 N.H. 781, 786, 930 A.2d 1190, 1195 (2007) (defining negligent infliction of emotional distress); Silva v. Warden, 150 N.H. 372, 374-75, 839 A.2d 4, 6-7 (2003) (finding expert testimony unnecessary to prove physical

symptoms suffered from emotional distress caused by intentional assaults like the unreasonable strip search of a prisoner); Thorpe v. State of N.H. Dep't of Corr., 133 N.H. 299, 304-05, 575 A.2d 351, 353-54 (1990) (holding that physical injury is required to state a claim for emotional distress). By conceding they neglected to "allege any physical injuries related to the challenged conditions," Pls.' Obj. ¶ 16, plaintiffs have waived any claims initially asserted in Count II.

Since, as a matter of both federal and state law, a showing of physical injury is required before compensatory damages may be awarded for claims of mental or emotional injury, and plaintiffs concede they have not made that prerequisite showing, defendant's motion for summary judgment is granted to the extent that plaintiffs request compensatory damages for emotional and mental injuries.

#### (iii) Statute of Limitations

Defendant next argues that any claims based on conduct or conditions that occurred before April 21, 2003, are barred by the statute of limitations, because this action was filed on April 21, 2006, and New Hampshire law provides a three year statute of limitations for personal injury actions. See N.H. Rev. Statutes

Ann. ("RSA") 508:4 (1997) ("all personal actions . . . may be brought only within 3 years of the act or omission complained of"); see also Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (holding that the forum's state law statute of limitations applies in § 1983 cases); Lopez-Gonzalez v. Municipality of Comerio, 404 F.3d 548, 551 (1st Cir. 2005) (same).

Plaintiffs counter that they are entitled to bring claims based on all the conduct and conditions which they were subjected to while incarcerated at the CCHOC, because it was all part of a course of conduct that ended within the statute of limitations, citing Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179 (1st Cir. 1989) and Rosario-Rivera v. Aqueduct & Sewer Auth. of P.R., 472 F. Supp. 2d 165 (D.P.R. 2007). Those two cases expanded the statute of limitations in employment discrimination actions by applying the "continuing violation" doctrine, which recognizes that acts that fall outside the relevant time period which can be linked to acts within the appropriate time frame may constitute one actionable course of conduct. See id. at 170-71 (citing authority to discuss the origins of the doctrine in Title VII cases); see also Mack, 871 F.2d at 182 (declining to extend limitations period based on continuing serial violation because

no act of the alleged racial and sexual discrimination occurred within the appropriate time frame). Plaintiffs now seek to extend the continuing violation doctrine beyond the employment context to their claims of unconstitutional conditions of confinement.

While the continuing violation doctrine is most commonly applied in the employment context, it has been extended to § 1983 actions challenging prison conditions. See e.g. Smith v. Shorstein, 217 Fed. Appx. 877, 880-81 (11th Cir. 2007) (explaining how the limitations clock starts to run when the continuing violation ceases); Foster v. Morris, 208 Fed. Appx. 174, 177-78 (3rd. Cir. 2006) (applying doctrine to reach untimely acts if they are related to and part of a continuing practice); Shannon v. Babb, 103 Fed. Appx. 201, 201-02 (9th Cir. 2004) (affirming dismissal of untimely prisoner claim for lost property because subsequent losses were caused by the initial decision and were not part of a pattern of conduct); Lovett v. Ray, 327 F.3d 1181, 1183 (11th Cir. 2003) (emphasizing that plaintiff must complain of a continuing violation not a present consequence of a past violation); Griswold v. Morgan, 317 F. Supp. 2d 226, 231 (W.D.N.Y. 2004) (citing Pino v. Ryan, 49 F.3d 51, 54 (2d Cir.

1999)). Whether in the employment or the prison context, the continuing violation doctrine is "an equitable exception that allows [a plaintiff] to seek damages for otherwise time-barred allegations if they are deemed part of an ongoing series of [] acts and there is 'some violation within the statute of limitations period that anchors the earlier claims.'" O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001) (quoting Provencher v. CVS Pharm., 145 F.3d 5, 14 (1st Cir. 1998) in the context of employment discrimination).

The critical issue in determining whether the doctrine applies is whether plaintiffs suffered from the ongoing effects of some past violation, in which case it would not, or whether plaintiffs suffered anew from distinct civil rights violations that were part of some continuous chain of activity, in which case the doctrine may be invoked. See O'Rourke, 235 F.3d at 730-31 (describing contours of the doctrine in the employment context); Smith, 217 Fed. Appx. at 881 (applying doctrine to continued unlawful detention of plaintiff); Lovett, 327 F.3d at 1183 (finding change of plaintiff's parole date was a one-time act with continued consequences and therefore not within the doctrine). This inquiry focuses on the point at which plaintiffs

were put on notice of the violation, to trigger the obligation to assert their rights within the appropriate time. See id. at 1182 (explaining that the statute begins to run when facts which would support a cause of action would be apparent to the reasonably prudent plaintiff); see also Sabree v. United Bhd. of Carpenters & Joiners, 921 F.2d 396, 401-02 (1st Cir. 1990) (discussing the policy goals behind statute of limitations for Title VII claims). If the prior act is substantially related to the act which falls within the relevant time period, then a continuing violation may be found. See id. “‘What matters is whether, when and to what extent the plaintiff was on inquiry notice.’” Id. at 402 (quoting Jensen v. Funk, 912 F.2d 517, 522 (1st Cir. 1990)).

A continuing violation may be either systemic or serial. Which type of violation plaintiffs assert here is not entirely clear. Plaintiffs argue that the unconstitutional conditions on B Block existed continuously from the time each was housed there until they were removed from the CCHOC. Repeated acts of unconstitutional treatment, however, even if they are similar, do not necessarily demonstrate a continuing violation. See e.g. Foster, 208 Fed. Appx. at 178 (declining to apply doctrine where failure to make prison handicap accessible was a permanent

problem about which plaintiff knew every time he was transferred to the facility); cf. Smith, 217 Fed. Appx. at 881 (series of transfers and detentions constituted a continuing violation); Griswold, 317 F. Supp. 2d at 231 (alleging a long series of events denying plaintiff treatment may demonstrate a continuing deliberate indifference to his medical needs). Whether or not plaintiffs may avail themselves of the doctrine depends on the answers to the following queries:

(1) subject matter - whether the violations constitute the same type of unconstitutional treatment, such that there is a substantial relationship between the otherwise untimely acts and the timely acts, tending to connect them in a continuing violation;

(2) frequency - whether the acts were recurring or more isolated and discrete; and

(3) permanence - whether the act had a degree of permanence that should have triggered plaintiffs' awareness of the need to assert their rights, and whether the consequences of the act would continue regardless of defendant's intent.

See Foster, 208 Fed. Appx. at 178 (citing Cowell v. Palmer Twp., 263 F.3d 286, 292 (3rd Cir. 2001); see also O'Rourke, 235 F.3d at 731.

These questions cannot be answered on the record before me. Although I am not prepared at this juncture to rule that all

claims based on the conditions on B Block before April 21, 2003, are barred by the statute of limitations, I am also not prepared to decide that plaintiffs can invoke the continuing violation doctrine. The current record does not contain sufficient evidence to determine the applicability of the doctrine at this juncture. Accordingly, a final decision on its application to the facts presented here shall be deferred to a later date after discovery is complete. Defendant's motion for summary judgment based on the statute of limitations, for now, is denied.

(iv) Challenged Conditions

Defendant next seeks summary judgment contending that the conditions at the CCHOC during plaintiffs' stay there were, in fact, constitutional. In support of this argument defendant cites the numerous grievance forms plaintiffs filed while housed there, none of which complained about the conditions challenged here. This argument is unavailing, however, because the record raises more disputes of fact about the conditions at the CCHOC than it resolves. Because these factual issues are material to the resolution of plaintiffs' alleged unconstitutional detention, summary judgment cannot be granted about the conditions on B Block at this stage in the proceedings.

Defendant's motion is granted, however, with respect to the Eighth Amendment claims. Plaintiffs allege that the challenged conditions violated both their Eighth and their Fourteenth Amendment rights. As pretrial detainees, however, the conditions of their confinement are protected by the Fourteenth, not the Eighth, Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979) (pretrial conditions of detention implicate the protection of deprivation of liberty without due process of law); Surprenant v. Rivas, 424 F.3d 5, 18 (1st Cir. 2005) (explaining that pretrial detainee's conditions of confinement implicate Fourteenth Amendment liberty interests). "For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell, 441 U.S. at 520; see also Martinez-Rivera v. Ramos, 498 F.3d 3, 9 (1st Cir. 2007) (same). The Fourteenth Amendment rights of pretrial detainees are coextensive with the Eighth Amendment's prohibition against cruel and unusual punishment, and claims for violations of those rights must satisfy both objective and subjective criteria. See Surprenant, 424 F.3d at 18 (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994)); Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002) (citing Bell, 441 U.S. at 545). Whether or not the

conditions on B Block objectively denied plaintiffs "the minimal civilized measure of life's necessities," Farmer, 511 U.S. at 834, and whether or not defendant acted with "deliberate indifference" to the risks presented by those conditions, id., raises questions of fact that a jury must resolve. Accordingly, the Eighth Amendment claims are dismissed and the action shall proceed with only the Fourteenth Amendment claims.

(v) Official and Individual Capacity Liability

Finally, defendant argues this action should be dismissed on summary judgment, because it cannot be brought against him in his official capacity, and he is entitled to qualified immunity for claims against him in his individual capacity.<sup>5</sup> Plaintiffs have declined to respond to these arguments.

Bringing this suit against defendant in his official capacity, as the Director of the CCHOC, is the same as bringing a suit against Carroll County. See Surprenant, 424 F.3d at 19 (citing authority). In order to hold the county liable,

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<sup>5</sup>Although defendant submits that plaintiffs are not clear about whether they intend to sue him in his official or individual capacity, or both, I will assume plaintiffs intended to sue defendant in both capacities because they define defendant as the "Director of the Carroll County Department of Corrections, an agency of the Carroll County government," and they seek both declaratory and monetary relief. See Compl., ¶¶ 6 & 36.

plaintiffs must prove that a “‘policy, statement, ordinance, regulation or decision officially adopted and promulgated by’ those in charge of the jail” directly caused the allegedly oppressive conditions about which they now complain. Id. (quoting Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690 (1978)). “A custom or practice may suffice to show such a policy if it is so widespread or pervasive that the policymakers must have had actual or constructive notice of it, yet did nothing to modify it.” Id. The undeveloped record precludes me from discerning whether there was some policy, custom or practice in place that caused the conditions at the CCHOC to be unconstitutional throughout the time period alleged, or whether the conditions were, in fact, constitutionally acceptable. See id. at 20-21 (proving the existence of a policy or custom and establishing whether such policy was imposed with the requisite scienter involve questions of fact). As a result, it is premature to determine that the county’s liability, or lack thereof, at this time.

Finally, defendant contends that he is entitled to qualified immunity to protect himself from plaintiffs’ request for monetary damages based on the conditions they endured while housed on B

Block. Qualified immunity would protect defendant from civil liability as long as the challenged conduct did not violate clearly established law. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (qualified immunity is available unless the right was so “clearly established” that a reasonable officer would have understood its dimensions and known his conduct violated the right); see also Surprenant, 424 F.3d at 14 (stating a three-part test to determine if defendant enjoys qualified immunity). Long before plaintiffs were detained at the CCHOC in 2002 and 2003, the law was clearly established that some combinations of conditions can amount to unconstitutional punishment of pretrial detainees. See e.g. Bell, 441 U.S. at 545 (“*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners); Farmer, 511 U.S. at 832–37 (discussing the scope of protection afforded prisoners); Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

Since the Fourteenth Amendment’s protection of pretrial detainees is coextensive with the Eighth Amendment’s protection of prisoners, the violations alleged here are subject to the same framework as an Eighth Amendment claim would be. See Surprenant,

424 F.3d at 18 (guarantees afforded by the Fourteenth Amendment for pretrial conditions of confinement are coextensive with the Eighth Amendment's guarantees for prison conditions); Burrell, 307 F.3d at 7 (analyzing pretrial detainee's claim according to the Eighth Amendment framework laid out in Farmer). Since at least Farmer, decided in 1994, if not as early as Bell, decided in 1979, it has been clear that "a prison official cannot be found liable under the [Constitution] for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837; see also Bell, 441 U.S. at 545. Defendant can be fairly charged with knowing this standard of care. See Harlow, 457 U.S. at 818.

As discussed above, the record does not establish whether the alleged conditions in fact violated constitutional standards, or whether defendant knew of those unconstitutional conditions but chose to do nothing to alleviate them. Whether the facts ultimately demonstrate that the conditions at the CCHOC were so oppressive and burdensome that they violated plaintiffs'

Fourteenth Amendment rights will determine whether or not defendant is liable. If plaintiffs allegations prove to be true, however, defendant cannot protect himself from liability with the defense of qualified immunity. As a result, defendant's motion based on the defense of qualified immunity is denied.


#### Conclusion

As explained more fully above, defendant's motion for summary judgment (document no. 9) is granted in part and denied in part. Defendant's motion is granted with respect to the following:

- the request for compensatory damages for claims based on anxiety, anguish and extreme emotional distress is barred by 42 U.S.C. § 1997e(e);
- Count II is dismissed because plaintiffs concede they alleged no bodily injury related to the challenged conditions;
- the claims based on alleged violations of plaintiffs' Eighth Amendment rights are dismissed, because plaintiffs were all pretrial detainees during the challenged period and were, therefore, protected by the Fourteenth Amendment.

In all other respects, the motion is denied. I also conclude that, as a matter of law, defendant cannot avail himself of the defense of qualified immunity.

**SO ORDERED.**

  
James R. Muirhead  
United States Magistrate Judge

Date: February 22, 2008

cc: Michael J. Sheehan, Esq.  
Charles P. Bauer, Esq.  
Lisa M. Lee, Esq.